80-2174

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NO: _____

THE SUPREME COURT OF THE UNITED STATES

_____ TERM

LEROY X. MASON, #86460,

Petitioner

vs.

R. F. ZAHRADNICK, Superintendent,
Virginia State Penitentiary,

Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF JURISDICTIONAL GROUNDS

The judgment appealed from was entered on March 26, 1981.

Jurisdiction is conferred upon this Court by 28 USCS 1254 which is set out verbatim below.

This is a petition for a Writ of Certiorari on the denial of a Writ of Habeas Corpus originally filed with the United States District Court for the Eastern District of Virginia.

STATEMENT OF THE CASE

Mason was convicted of murder in the first degree, 2 counts, and sentenced to forty (40) years on each count to run consecutively. The verdict was rendered on February 27, 1975. Mason is currently serving that sentence in the Penal System of Virginia. The two murders were committed on or about September 9, 1973.

The atmosphere of the trial was hostile from the beginning. Mason's attorney, Geroyd Greene, now known as Said El Amin, had had a previous run in with Judge Armstead, the presiding Judge in the Mason case, and Greene had been jailed for contempt. Armstead felt and stated publicly that bygones could be bygones and the trial could proceed as scheduled. Greene wouldn't let it go at that, and from the opening gavel,

proceeded with a barrage of abuse directed towards the bench, which abuse was returned from the bench. Comments were made by the trial Judge that "I'm sure you know better" (Tr. 172, 11. 18-19) (Appendix, page 17) and ". . .If you don't like it (my ruling), you can just appeal" to cite a couple. The comments were probably true, but unfortunate in that the jury was present, and obviously forced to focus more on the drama unfolding between these two grown men, rather than the facts and issues involved in the trial. The culmination of it all came on the second day of trial when Greene, who persisted in asking a question previously ruled on by the Court, was held in contempt out of the presence of the jury. Greene <u>insisted</u> that the Court read the contempt citation to the jury, and the Judge acquiesced in that

ludicrous request. I believe all this to be an unfortunate series of events for Mr. Mason, who was at all times, entitled to a fair trial on the merits as opposed to the personalities of his attorney and Judge Armstead. At any rate, the tone of the trial having been set, the proceedings were even a more flagrant violation of the rights of the accused. The Prosecution was guilty of misconduct in several respects. The Prosecution didn't tell the Defense about the car that was at the scene of the crime, at the time of the crime, that set the scene differently from the way Cobbs testified. That discovery was made by Donald Montgomery, a State of Virginia Game Warden, see Section 2, infra. Defense Attorney raised this issue at trial, citing Brady vs. Maryland, sec (Tr. 114, 11. 14-16)

(Appendix, page 17), (Tr. 123, ll. 7-13) (Appendix, page 17), (Tr. 133, ll. 8-19) (Appendix, page 18), and (Tr. 134, ll. 7 & 8) (Appendix, page 19). The question was again raised on Habeas Corpus to the Supreme Court of Virginia which denied the petition and then to the United States District Court for the Eastern District of Virginia which also denied the petition. It was then appealed to the United States Court of Appeals for the Fourth Circuit, and is now before you. The Prosecuting Attorney again violated Virginia Law by commenting on the failure of Mason's wife to testify, Section 3, infra, and Greene didn't object or ask for a mistrial, see Section 4, infra. This issue was first raised in the Eastern District Court on Habeas Corpus and denied as a State matter; then raised in the Supreme

Court of Virginia on Habeas Corpus and was denied; and taken to the United States District Court for the Eastern District, where it was dismissed as successive.

The jury found Mason guilty, and he appealed, this time represented by Melvin Hughes, who didn't even raise the suppression argument. The appeal was dismissed. I was retained and filed the first Petition in District Court on August 6, 1976. The issues raised are set our in the Appendix, page 10.

I, then, exhausted the remaining grounds involved in this Petition, by filing a Habeas Corpus Petition with the Supreme Court of Virginia on May 23, 1978. That Petition was denied on September 5, 1978. My grounds at the time are set out in the Appendix, page 12.

The United States Eastern District

Court, Richmond, Virginia, denied the Petition on February 5, 1980, Final Judgment being entered on April 8, 1980; the Fourth Circuit Court of Appeals affirmed this on March 26, 1981.

The District Court ruled that my Petition was successive, and the Fourth Circuit affirmed. The current issue concerning the effectiveness of Greene was first raised in a Petition for a Writ of Habeas Corpus to the Supreme Court of Virginia. It was denied on September 5, 1978 and makes up part of the present Petition.

ARGUMENT I

The District Court committed reversible error in ruling that 28 USCS 2254, Rule 9(b) barred Mason's second application for a Writ of Habeas Corpus.

It is immediately apparent that Rule 9(b) concerns itself with the protection of our federal system, and the federal courts. It prohibits the never-ending barrage of writs by prisoners, trying anything possible to get out of prison. Although their conduct is understandable, it is nevertheless time consuming, expensive and generally useless. The Rule was not designed to prohibit valid petitions by prisoners with true grievances that have not previously been aired, from filing a petition for relief in the federal courts. Leroy Mason is raising issues today that are valid, had not been raised in his prior

petition, and could not have been raised in that petition, since he had not exhausted his state remedies under 28 USCS 2254 (b). The exhaustion requirements were met on September 5, 1978 when the Supreme Court of Virginia denied Mason's final plea to that tribunal, and paved the way for this petition.

Though dealing with 28 USCS 2255, Sanders vs. U.S. 373 U.S. 1, 10 L.Ed.2d 148, 83 S.Ct. 1068 (1963) is controlling. Sanders filed his first petition for a Writ of Habeas Corpus alleging that his indictment was invalid, that he was denied adequate representation of counsel, and that his guilty plea was coerced by the Court, without counsel and without knowledge of the charges against him. His petition alleged no facts and was dismissed. He filed a

subsequent petition alleging mental incompetence at the time of his trial, during which he pled guilty. He alleged that he was an addict, and this fact was known to jail authorities who administered narcotic drugs before and during the time of his trial. The District Court dismissed this petition as being repetitious, and the Ninth Circuit Court of Appeals affirmed. The Supreme Court reversed. The standards to be applied in 2254 cases are as follows: (1) The same ground was presented in the prior petition, and was decided adversely to the Petitioner; (2) The decision was on the merits; and (3) The ends of justice must ultimately control. The Court went on to define "ground" as the legal basis upon which relief is sought. The Court further stated that if any "doubt" arises, it should be resolved in

favor of the Petitioner. (Emphasis added)

Two of the grounds raised today have been raised previously in Mason's first (1976) petition, which was filed with the District Court. Those two grounds were:

(1) The Prosecuting Attorney again deprived Mason of a fair trial, when he violated Virginia Code Ann. Sec. 19.2-271.2 by commenting on the failure of Mason's wife to testify, in his closing argument to the jury.

The ground, though the same, was not decided on the merits, as defined in Sanders. It was dismissed as a state procedural issue, see Memorandum Opinion dated July 26, 1977 of Judge Warriner, Appendix, page 7.

(2) His ineffective assistance of counsel was also raised; but, the facts

were different. This, of course, can constitute the same ground under Sanders, but the ends of justice must prevail, and any doubt must be resolved in favor of Petitioner. The ineffectiveness argument of the 1976 petition centered around the Court's intimidation of Greene, rendering him ineffective. In this petition, we are alleging that Greene, by inaction, cost his client a mistrial, or a reversal of a refusal to grant a mistrial, see Section 4, infra.

There was never any abuse of the Writ intended by me when I filed either of the two Habeas Corpus petitions in this case. First of all, I hate extra work; but, most importantly, the exhaustion requirements had not been satisfied, and to raise the issue would have met with immediate summary dismissal.

ARGUMENT II

Mason was deprived of a fair trial by the Prosecuting Attorney's suppression of vital exculpatory evidence.

There are three separate rules involving the burden imposed upon Defendant in assessing the weight to be given to the Prosecution's failure to properly disclose exculpatory evidence.

The Mooney Rule, Mooney vs. Holohan 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935) deals with the Prosecution's knowing use of perjured testimony, and if so, the verdict will be set aside, if there exists a reasonable likelihood that the false testimony could have affected the outcome. (Emphasis added)

The Brady Test, Brady vs. Maryland 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963) applies where the Defendant has made an express request for specific

evidence which is material and irrespective of the good or bad faith of the Prosecutor, it is withheld. In this situation, if the suppressed evidence might have affected the outcome, the verdict will have to be set aside. (Emphasis added)

The Agurs Test, U.S. vs. Agurs 427 U.S. 97, 76 S.Ct. 2392, 49 L.Ed.2d 342 (1976) applies where no request is made, or a general request for any exculpatory evidence is tendered to the Prosecution, and if the evidence is obviously of substantial value to the Defense, production is required, and failure to volunteer will result in a new trial if the evidence creates a reasonable doubt that did not otherwise exist. (Emphasis added) In Dozier vs. Commonwealth 219 Va. 1113, 253 S.E.2d 655 (1979) the Virginia Supreme Court held that even

if the exculpatory evidence is solely for impeachment purposes, it is material in the constitutional sense, and must be disclosed.

In this case, we have a failure of the Prosecution to disclose powerful exculpatory evidence. On the night of the murder, we have Donald Montgomery, a Game Warden for the State of Virginia, traveling through Charles City County on Route 607. He sees a parked car in the dirt lane leading to the gravel pit, where the bodies were found, the next day. He thought there might be a game violation; but, because of the driver's attire, he changed his mind and went on. He filed a report with Investigator Strickland, when the bodies were discovered. His report stated that he saw a late model vehicle, dark in color, possibly a Pontiac or Oldsmobile, with

three people in the front seat. The driver was well dressed and wearing a necktie. The time was about 11:30 p.m. to midnight. The occupants appeared to be two males and one female (Tr. 133, ll. 8-19) (Appendix, page 18).

Cobbs testified that she and Mason left Roanoke Rapids, she following Mason in his white Cougar, Mason driving the victim's dark green car (Tr. 279, ll. 18-20) (Appendix, page 19), with the two victims; that he pulled into a dirt road, she behind him on the hard surface road (Tr. 308, ll. 18-24) (Appendix, page 20); that he stopped at the entrance and got out of the car he was driving and told her to pull up, and wait, which she did, about thirty minutes (Tr. 309, ll. 4-15) (Appendix, page 20).

Montgomery only saw one car, a dark green one, containing three people. What

happened to the white Cougar, with Cobbs along? It wasn't there, and neither was Mason. This murder could not have occurred the way Elaine Cobbs said that it did.

The evidence was not disclosed, although Greene had asked Strickland, the investigator, to advise him of any exculpatory evidence, and Strickland said he would (Tr. 133, ll. 8-19) (Appendix, page 18). Greene requested, in writing, that the Prosecution supply him with any exculpatory evidence in accordance with Brady, and this information was withheld. It was discovered by accident when Greene was reviewing Strickland's notes during cross-examination. Montgomery was called in; but, could not remember much of anything, and the Judge would not admit the report. The trial was a year and a half later. Great weight is put on

the fact that the evidence was disclosed at trial, and that's true, it was. But, what good was it at that late date. Montgomery may have remembered it a year or eighteen months earlier. That's certainly a reasonable inference. Because of the delay, he had forgotten, and the suppression of this evidence hurt the Defendant, and denied him a fair trial. The crucial point is that the evidence was available from the beginning and it was known from the beginning, and it was suppressed until the end. The Defendant was denied a Defense.

Which Test applies? It really doesn't matter. A Brady request was made; but, it was in general terms. Even if it's treated as a general request, the Agurs Test is good enough, because this evidence, without question,

creates a reasonable doubt that did not otherwise exist. It casts further doubt on the veracity of Cobbs, and it shows that another vehicle was at the scene at the time of the murder, and this evidence was critical to the Defense, and was suppressed in violation of his rights to a fair trial.

ARGUMENT III

The Fourth Circuit Court of Appeals erred in ruling evidence was neither exculpatory nor suppressed; but, merely inconsequential.

It is discovered from the facts as outlined under Argument II above, that the evidence sought to be introduced was more than inconsequential. It set the scene entirely differently. It was not the oral report given by Montgomery to Strickland that was important. It was not the transcription of that report

by Strickland that was important. It was the fact that it was observed, known to the Prosecution, and suppressed. The report shows facts that could have, if properly developed, been used by Defense to give the jury another alternative than the one as set out by Cobbs.

ARGUMENT IV

Mason was again deprived of a fair trial when Macon, the Commonwealth Attorney, commented on the failure of Mason's wife to testify.

The Commonwealth's Attorney, in direct violation of then Section 8-288, Code of Virginia, 1950, as amended, (re-codified as Va. Code Ann. Sec. 19.2-271.2 (Cum. Supp. 1979)) commented on the failure of Petitioner's wife to testify.

> "Now, another point is very important and that is Mr. Mason's alibi. Joanne Jones and Catherine Taylor and Mr. Mason, but there

> is one big gap. That is, Mr. Mason's wife. Why didn't she come here and testify? You draw your own conclusions, was she afraid to get into the web of this thing or perjure herself? Were they afraid to put her on the stand and she might--what kind of person is she? We don't know." "What kind of alibi is this? When the one woman, the wife, she is the one person that could have given a valid support to that alibi and she doesn't appear. She didn't testify."

Va. Code Ann. Sec. 8-288 explictly stated that:

> ". . .The failure of either husband or wife to testify, however, shall create no presumption against the accused, nor be the subject of any comment before the Court or jury by any attorney. . ." (Emphasis added)

In Jones vs. Commonwealth 218 Va. 732, 240 S.E.2d 526 (1978), the Commonwealth Attorney mentioned in his closing statement that the Defendant's wife did not testify, as follows:

> ". . .But the inference I want you to draw is if he spent the

night with her why didn't she testify that she was in New York or where she was. Why isn't she here to testify? It is a simple reason."

Statement of Commonwealth Attorney.

Ibid at 735. The Virginia Supreme Court in Jones, held that such a comment by an attorney was precisely the kind of argument which Code Sec. 8-288 was intended to prohibit, and that the Code Section is mandatory. The Court held that this was not harmless error; the Court could not say that Jones was not prejudiced by the error, at least as to the quantum of punishment. Ibid at 737. Jones' conviction was reversed and the case remanded for a new trial.

The similarity between the case at bar and Jones is patent, as the two transcript excerpts illustrate. Petitioner submits, therefore, that he suffered prejudicial error, and as in the

Jones decision, must be awarded a new trial.

The District Court, in Mason's 1976 petition, ruled that this was a state procedural requirement; but, the Virginia Supreme Court has not administered state procedural law equally. Mason was denied a Writ of Certiorari, in the face of the 19.2-271.2, supra and Jones was given a new trial in 1978. Mason was entitled to a new trial; he did not get one; and either he has been denied equal protection of the law, or denied due process of law, possibly because his trial attorney, Greene, did not preserve the point, Section 4, next.

ARGUMENT V

Mason was again deprived of a fair trial, due to the ineffectiveness of his attorney.

Defense Counsel, Geroyd X. Greene,

did not object to the above comment by Commonwealth Attorney regarding the failure of Petitioner's wife to testify. Such action on the part of any attorney at trial is the subject of the Code Section cited above, and a recent Virginia case. Defense Counsel's failure to object to such argument by the Commonwealth's Attorney exceeds any notion of mere trial tactics and enters the realm of incompetence by allowing the jury to hear prohibited prejudicial remarks by the Prosecution. The only difference between the Jones case, supra, and the Mason case, was that in Jones, Defense Counsel objected and requested a mistrial, as he was required.

It was gross ineffectiveness to not object and ask for a new trial, in the face of all that had transpired in that three day ordeal.

CONCLUSION

The aggregate of all that transpired in the course of the trial, was to deprive Mason of his rights. He was convicted in a Court where the Judge entered the drama as an advocate; he was represented by an attorney who spent his day in Court fighting with the Judge and eventually went to jail himself; he was prosecuted by a Commonwealth Attorney who cheated; and in the face of all this, his attorney failed to take the one clear, positive and required step that would have had to result in a new trial, his for the asking.

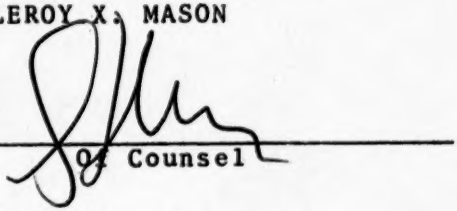
Because of the flagrant abuses and deprivations contained in the Mason trial, oral argument is respectfully requested.

The decision of the District Court and the Fourth Circuit clearly violates

the established law of this Court and Certiorari is the appropriate remedy under the Rules of the Supreme Court of the United States, Rule 17.1(c). Their holding violates, Sanders, Brady and Agurs.

Respectfully submitted,

LEROY X. MASON

BY: 
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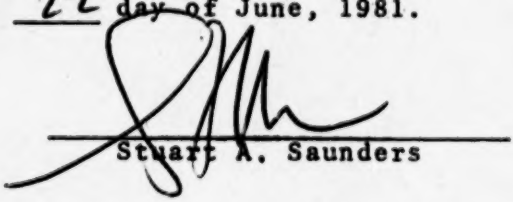
CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing Petition for a Writ of Certiorari was mailed to the Office of the Attorney General, Richmond, Virginia 23219 this 22 day of June, 1981.



Stuart A. Saunders

NO: _____

THE SUPREME COURT OF THE UNITED STATES

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LEROY X. MASON, #86460,

Petitioner

vs.

R. F. ZAHRADNICK, Superintendent,
Virginia State Penitentiary,

Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

APPENDIX

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IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, RICHMOND DIVISION

LEROY X. MASON

v.

R. F. ZAHRADNICK, etc.

CIVIL ACTION
NO. 79-0915-R

JUDGMENT

In accordance with the memorandum filed herewith, it is ORDERED that the petition is DISMISSED and judgment is entered for respondent.

Should petitioner desire to appeal, written notice of appeal must be filed with the Clerk of the Court within 30 days of this date.

/s/ D. Dortch Warriner
United States District Judge

Date: 5 February 1980

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, RICHMOND DIVISION

LEROY X. MASON

v.

R. F. ZAHRADNICK, etc.

CIVIL ACTION
NO. 79-0915-R

MEMORANDUM

On 23 January 1980 respondent filed his motion for summary judgment accompanied by an appropriate brief. The date upon which petitioner was required to file his reply brief has passed and no reply brief has been filed. The Court will consider the motion on the present state of the record.

This is petitioner's second effort to obtain a writ of habeas corpus. His previous petition was denied by this Court, the decision was affirmed by the Court of Appeals, and the petition for a rehearing

was denied. The United States Supreme Court denied a petition for a writ of certiorari.

By the very nature of the claims made in the instant petition for a writ of habeas corpus, it is inconceivable that there could be a justifiable reason why such claims were not asserted in the original petition.

It is clear that there was no suppression of evidence and insofar as certain occurrences may be interpreted by plaintiff as a suppression of evidence, those occurrences were known to plaintiff at the time he filed his initial petition.

The comment by the attorney for the Commonwealth on the failure of petitioner's wife to testify was a comment known to petitioner at the time he filed his original petition.

Insofar as counsel for petitioner may

have been ineffective in the manner alleged, such ineffectiveness was known to petitioner at the time he filed his original petition.

Insofar as each of the above claims denied petitioner a fair and impartial trial, such denial was known to petitioner at the time he filed his initial petition.

It is an abuse of the petition for a writ of habeas corpus to simply hire new lawyers and start all over again every year or so. Courts need not tolerate such needless piecemeal litigation. Sanders v. United States 373 U.S. 1, 18 (1963). Cunningham vs. Estelle, 537 F.2d 82, 83 (5th Cir. 1976).

Although the Court of Appeals for the Fourth Circuit reversed the district court in similar circumstances in Johnson vs. Copinger, 420 F.2d 395 (4th

Cir. 1969), the ground for that reversal has no application here. Both in his petition and in the briefing schedule set up by the Court and agreed to by counsel, petitioner had or was given an opportunity to explain his failure to present his "new" claims in the prior petition. No such explanation has been assayed. The nature of the claims here asserted are such that petitioner's failure to justify his prior omission is understandable.

Thus, insofar as the present petition reiterates claims made in the previous petition the present petition should be dismissed as successive. Insofar as new claims may be said to be advanced, the ends of justice would not be served by considering them.

An appropriate order shall issue.

/s/ D. Dortch Warriner
United States District
Judge

Date: 5 February 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

LEROY MASON

-v-

R. F. ZAHRADNICK

CIVIL ACTION NO. 76-0340-R
Magistrate No. 76-0163-L

MEMORANDUM OPINION

Petitioner, a Virginia State prisoner, filed this petition for writ of habeas corpus pursuant to 28 USCS §2254 on August 6, 1976, alleging that he had been denied a fair trial as a result of the "impartial (sic) prejudicial and improper actions and comments of the trial court". He also alleged that he was denied effective assistance of counsel when the Court overruled his defense attorney's motion to withdraw and by the Court's intimidating and disparaging

remarks to defense counsel. Additionally, he alleged that the Court erred in not declaring a mistrial after the Court had held petitioner's attorney (Mr. Geroyd Greene, Esquire) in contempt in the presence of the jury; that the Court erred in not declaring a mistrial because reference was made to the use of a polygraph; that the Court erred in allowing the Commonwealth Attorney to comment on the failure of petitioner's wife to testify; that the Court erred in restricting cross-examination of Commonwealth's chief witness; and that the Court erred in not suppressing certain evidence obtained by a Federal search warrant. The defendant has filed his motion to dismiss and the Court has reviewed the State Court records in this case. There are no genuine issues of material fact in dispute and there is no

necessity for an evidentiary hearing. Townsend vs. Sain 372 U.S. 293 (1963). The case is before the Court on defendant's motion to dismiss.

At the outset it is clear that several allegations are without merit because the errors claimed on their face are matters of local procedure or evidence. Thus, the allegation with respect to the polygraph screening, and the objection to the reference of the failure of petitioner's wife to take the stand, will be dismissed. Grundler vs. N.C. 283 F.2d 798 (4th Cir. 1960). Petitioner's allegation that certain items of evidence consisting of two long barrel guns should have been suppressed is without merit. The matter was litigated in the State Courts on petitioner's motion to suppress and this Ccurt may not now consider the matter. Stone v.

Powell, ____ U.S.____ 19 Cr.L 3333 (7/6/76).

Petitioner's allegation that the trial judge denied petitioner a fair trial by his actions and comments is belied by the transcript and based on the entire record the Court holds that the actions of the trial judge were impartial, and indeed may have been partial towards the petitioner. For example, the Court endeavored to obtain the presence of certain witnesses on behalf of the petitioner even though no subpoenas or orders were requested until the day of trial. While it is true that the Court admonished counsel to cease certain lines of cross-examination, and characterized some of the questions as "ridiculous" the interruption of the trial judge did not result in a deprivation of petitioner's right to a fair and

impartial trial. U.S. v. Porter 441 F.2d 1204 (8th Cir. 1971). Furthermore, in his opening charge to the jury, the Court specifically directed the jurors not to allow any feelings or animosities toward counsel bare upon the ultimate issue of the petitioner's guilt or innocence. (TR 55) This allegation is without merit.

Likewise without merit is petitioner's claim that he was denied the effective assistance of counsel when the trial court rejected a motion by petitioner's counsel (Mr. Geroyd X. Greene) to withdraw from the case. The record disclosed that Mr. Greene made this motion on September 16, 1974, less than one month before the scheduled trial date. In his affidavit submitted with his motion to withdraw, Mr. Greene averred that he thought the trial of the case would be before a different judge, and

that because he had previously been held in contempt for his trial tactics by the presiding Judge (Honorable Robert T. Armstead) the petitioner might not receive a fair trial. In denying this motion, the trial court ordered that: ". . .this ruling is without prejudice to any subsequent motion to withdraw that may be made if and when other competent counsel is obtained who is acceptable to the accused and is prepared to go forward with the trial." Vol. II, p. 21, Record of the State Proceedings. It is particularly noteworthy that on motion of the petitioner the case was continued generally pending the outcome of a motion to suppress evidence seized under a Federal search warrant, by a United States District Court in North Carolina. Thus, both

Mr. Greene, and the petitioner[1] had ample time to seek counsel other than Mr. Greene to represent petitioner. It was not until January of 1975 that the case was reinstated on the active docket of the Circuit Court of Charles City County on petitioner's motion. That petitioner was aware that other counsel were available may be found in his letter to Melvin R. Hughes, Jr., Esquire (Vol. II, p. 49, Record of State Court Proceedings), in which petitioner clearly stated such knowledge. He will not now be allowed to claim he was denied adequate counsel since the record reflects his free choice to have Mr. Greene continue representing him.

Similarly, the record refutes the

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[1] A verified copy of the order denying Mr. Greene's motion to withdraw was sent to petitioner. Vol. II, p. 21, Record of State Court Proceedings.

allegation that Mr. Greene was in any way intimidated by Judge Armstead. Counsel for petitioner was so rigorous in his cross-examination of witnesses that the Court admonished him on several occasions without any success. Indeed after excusing the jury Judge Armstead warned Mr. Greene that if he persisted in certain line of questioning, he would be held in contempt. (TR 310-312). Nevertheless, counsel persisted and was ultimately held in contempt. Even after the contempt citation, counsel maintained his vigorous defense for petitioner. Reviewing the record in its entirety, it is clear that Mr. Greene was not in any way intimidated by the judge. Any interruptions by the judge did not deny petitioner a fair or impartial trial. U.S. vs. Porter, supra. Finally, with respect to the remaining allegation that

petitioner was denied a fair and impartial trial when his counsel was held in contempt in the presence of the jury, the Court takes notice of its own records and finds that Mr. Mason is no ordinary litigant. He has filed previous petitioners and complaints, and has participated in court hearings. Since he was forewarned of the possibilities of his attorney being held in contempt, his failure to object to counsel's actions may be held as tacit approval of Mr. Greene's tactics, and he may now be precluded from complaining about them. In any event, this issue has never been presented to the Virginia Supreme Court, and this Court will not now rule on the question. Slayton vs. Smith 404 U.S 53 (1971).

Defendant's motion to dismiss will be granted in accordance with this memorandum.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 80-6609

Leroy X. Mason, #86460,

Appellant

v.

R. F. Zahradnick, Superintendent,
Virginia State Penitentiary,

Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. D. Dortch Warriner, District Judge.

Argued March 2, 1981 Decided March 26, 1981

Before WINTER and HALL, Circuit Judges, and MICHAEL, District Judge.

Stuart A. Saunders (Saunders, Rogers & Blount on brief) for Appellant; James E. Kulp, Deputy Attorney General (Marshall Coleman, Attorney General of Virginia on brief) for Appellee.

Honorable James H. Michael, Jr., United States District Judge for the Western District of Virginia, sitting by designation.

PER CURIAM:

The district court dismissed Mason's second petition for a writ of habeas corpus on the grounds (1) that his claims of ineffective assistance of counsel, denial of a fair trial and denial of due process by the prosecutor's comment on the failure of Mason's wife to testify were successive, and (2) that Mason's claim that the prosecution suppressed exculpatory evidence was deliberately withheld by Mason when he first sought a writ

of habeas corpus. Mason appeals, and we affirm.

We agree with the district court that three of Mason's claims are successive. We are persuaded also that the "exculpatory evidence" that was allegedly "suppressed" was neither exculpatory nor was it suppressed. It consisted of a report of an investigating officer of a statement made to him by a Mr. Montgomery who testified at trial at variance with an inconsequential detail in the report. The report was produced at trial and Montgomery was cross-examined about it. The trial court declined to admit the report into evidence, but even if it had been admitted, it would have constituted the mildest impeachment of Montgomery. There is no reasonable possibility that it would have affected the outcome of the trial. AFFIRMED.

ISSUES RAISED IN THE PETITION FOR HABEAS CORPUS FILED IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA ON AUGUST 6, 1976.

1. Petitioner's constitutional right to a fair trial was denied as a result of the impartial, prejudicial, and improper actions and comments of the trial court.

2. Petitioner was deprived of his right to effective assistance of Counsel because of the Court's refusal to grant Defense Counsel's request prior to trial to withdraw his appearance on behalf of the Petitioner and by the Court's intimidating and disparaging remarks directed at Defense Counsel.

3. The Court erred in refusing to grant a mistrial after holding Defense Counsel in contempt of Court in the presence of the jury.

4. The Court erred in refusing to

grant a mistrial after the Commonwealth referred to the use of polygraph screening of the chief witness for the Commonwealth in its argument to the jury.

5. Statements by the Commonwealth regarding the failure of Petitioner's wife to testify constitute reversible error.

6. The Court erred in restraining the Petitioner's cross-examination of the Commonwealth's chief witness in his attempt to undermine that witness' credibility.

7. The Court erred in admitting evidence obtained by a search warrant which was based solely on information obtained from the spouse of the accused without his knowledge or approval.

ISSUES RAISED IN THE INSTANT PETITION FOR A WRIT OF HABEAS CORPUS WHICH WAS DENIED FEBRUARY 6, 1980, FINAL JUDGMENT ENTERED ON APRIL 8, 1980, AND AFFIRMED BY THE UNITED STATES COURT OF APPEALS ON MARCH 26, 1981.

1. Prosecution's comment on the failure of Mason's wife to testify.

2. Ineffective assistance of counsel in not objecting to closing argument or filing a motion for a mistrial.

3. Suppression of exculpatory evidence.

28 USCS §1254(1)

§1254. Court of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

1. By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

28 USCS §2254

§2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the Unites States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or

the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

28 USCS §2254, Rule 9(b)

§2254, Rule 9(b) states:

"A second or successive petition may be dismissed if the Judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the Judge finds that the failure of the Petitioner to assert those grounds in a prior petition constituted an abuse of the Writ."

TRANSCRIPT CITATIONS

Tr. 172, ll. 18-19 - THE COURT TO MR. GREENE:

Whether you like it the ruling or not you don't, if you don't like it just appeal.

Tr. 114, ll. 14-16 - MR. GREENE TO MR. STRICKLAND:

Q. Did you have an occasion to talk to a Mr. Robert Montgomery, who is a game warden, isn't that correct?

A. Yes.

Tr. 123, ll. 7-13 - MR. GREENE TO MR. STRICKLAND:

Q. Did you report the statement of Mr. Montgomery to the Commonwealth Attorneys, sir? Was he, did he have knowledge of that fact, sir?

A. The Commonwealth Attorney

received a copy of my report.

Q. Did you send me a copy of the report?

A. No, sir.

Tr. 133, ll. 8-19 - MR. GREENE TO MR. STRICKLAND:

Q. Mr. Strickland, since the inception of this case we have had several discussions, have we not? Concerning this case?

A. Yes, on two occasions, I think we talked.

Q. On one occasion in fact you told me that if you found any information which you considered to be favorable to Mr. Mason or if I had any favorable information and if I gave it to you you would certainly follow it up, isn't that correct?

A. Yes, I did.

Tr. 134, ll. 7 & 8 - MR. GREENE TO MR. STRICKLAND:

Q. Did you attempt to give me that information about Mr. Montgomery?

A. No sir.

Tr. 279, ll. 18-20 - MR. GREENE TO MS. COBBS:

A. His - in his car.

Q. You know what kind of car it was?

A. A white Cougar.

Tr. 301, ll. 10-16 - MR. GREENE TO MS. COBBS:

Q. What transpired after they came out?

A. Um - he put the people in that dark green car that was in their drive-way and they got in and he got in and started driving.

Q. And what if anything did you do?

A. Um - before he got in he gave this

hand signal you know, to follow him.

Tr. 308, ll. 18-24 - MR. GREEN TO MS. COBBS:

Q. All right, you were on the hard surface and then Mr. Mason had driven his car in - down on a dirt road kind of thing?

A. Yes.

Q. And what happened?

A. Well, he stopped right at the entrance of it and told me to pull up.

Tr. 309, ll. 4-15 - MR. GREENE TO MS. COBBS:

Q. What did he tell you?

A. He told me to pull out a little ways and wait for him.

Q. Did he already - did he go back and get in the green car?

A. Yes, he did.

Q. Were there people in the car at that time?

A. Yes.

Q. And what happened?

A. Well, I parked like he told me to and I stayed there about thirty minutes I would say.